THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID#: 0604021383
	)	
BARTNELL A. NEWMAN,	)	
Defendant.	)	

Submitted: November 18, 2008
Decided: February 27, 2009

ORDER

Upon Defendant's Motion for Postconviction Relief – *DENIED*

1. On April 28, 2006, Defendant was arrested after attempting to complete an arranged drug sale with undercover Wilmington police officers. The officers contacted Defendant after obtaining his cell phone number from a drug overdose victim. After a few calls, the officers and Defendant agreed to meet where the transaction would take place. Clad in bullet-proof vests, the plain-clothes officers arrived and confronted Defendant as he approached their vehicle. Defendant ran, but was arrested two blocks away.

2. A jury convicted Defendant on October 27, 2006, of Possession With Intent to Deliver Fentanyl, Possession of Fentanyl Within 300 Feet of a Park, and Resisting Arrest. On February 9, 2007, Defendant was fined and sentenced to

four years at Level V, followed by Level III probation.

3. Defendant filed a direct appeal. On January 8, 2008, the Delaware Supreme Court affirmed Defendant's conviction.[1] The mandate was received on January 28, 2008.

4. On June 18, 2008, Defendant filed a timely motion for postconviction relief. The motion was properly referred[2] and, after preliminary review, the court ordered the State and trial counsel to respond.[3] Defendant was granted leave to reply.

5. Trial counsel's affidavit was received on September 18, 2008, followed by the State's response on September 26, 2008. The State contends that Defendant's claims are barred under Rule 61(i)(3) and are otherwise without merit. Defendant filed a reply on October 27, 2008, which he supplemented without permission on November 18, 2008.

6. Defendant's motion presents five grounds for relief: (1) ineffective assistance of trial counsel, (2) denial of Defendant's Sixth Amendment right to confrontation, (3) insufficiency of evidence to support his intent to deliver

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[1] *Newman v. State*, 942 A.2d 588.

[2] Super. Ct. Crim. R. 61(d)(1).

[3] Super. Ct. Crim. R. 61(f)(1).

conviction, (4) illegal detention and seizure, and (5) ineffective assistance of appellate counsel.

7. As to the ineffective assistance of counsel claims, Defendant specifically asserts that trial counsel was ineffective for: failing to "address" the State's witnesses about the Possession With Intent to Deliver charge and about the telephone conversation between the police and Defendant; and failing to explain and offer Defendant a choice between a jury or bench trial. Defendant also claims (frivolously), that trial counsel was ineffective for: requesting non-exculpatory hearsay testimony be excluded from trial; and allowing the State to drop a second Possession With Intent to Deliver charge. Lastly, Defendant claims that appellate counsel was ineffective for failing to argue the current grounds for relief on direct appeal.

8. Before considering a Rule 61 motion's merits, the court must address the procedural bars enumerated in Rule 61(i).[4] A Rule 61 motion that cannot overcome the procedural bars, absent an exception, must be denied.[5]

9. As to this motion, Rule 61(i)(3) bars "[a]ny ground for relief that

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[4] *See* Super. Ct. Crim. R. 61(i); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[5] *See Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

was not asserted in the proceedings leading to the judgement of conviction."[6] Rule 61(i)(3)'s bar will not apply if a defendant can show cause for relief and prejudice from a violation of rights.[7] Cause must be proven by "a showing of some external impediment preventing counsel from constructing or raising the claim [previously]."[8] Prejudice must be substantiated by showing a "substantial likelihood" that had the issue been properly presented, the outcome would be different.[9] Additionally, Rule 61(i)(3)'s bar will not apply if a defendant presents "a colorable claim that there was a miscarriage of justice because of a constitutional violation."[10]

10. Except for his ineffective assistance of counsel claims, Defendant's claims are procedurally barred, and he has shown neither cause nor prejudice to excuse his procedural defaults. Defendant's ineffective assistance claims, on the other hand, are not procedurally barred because this is Defendant's first opportunity to present them.

11. To establish a claim for ineffective assistance of counsel,

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[6] Super. Ct. Crim. R. 61(i)(3).

[7] Super. Ct. Crim. R. 61(i)(3)(A)-(B).

[8] *Younger*, 580 A.2d at 556.

[9] *Flamer*, 585 A.2d at 748.

[10] Super. Ct. Crim. R. 61(i)(5); *see also State v. Getz*, 1994 WL 465543 (Del. Super. July 15, 1994) (holding "mere 'speculation' that a different result might have [been] obtained certainly does not satisfy the requirement").

Defendant must satisfy *Strickland v. Washington*'s two-part test.[11] Defendant must show: 1) that counsel's representation did not meet a reasonable professional standard and 2) the poor representation was prejudicial to Defendant.[12] To prove prejudice, Defendant must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different."[13] It is not enough, therefore, if Defendant merely gins-up a list of things he thinks his trial or appellate counsel should have done.[14]

12. Defendant must present evidence that overcomes the strong presumption that counsel's representation was reasonable.[15] The standard is the same for trial and appellate counsel.[16] The court does not have to review both tests if Defendant fails the first one.[17] If, however, Defendant rebuts the presumption of effectiveness, he still must demonstrate that counsel's failure actually made a difference to the outcome. So, for example, if Defendant can show that his counsel

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[11] 466 U.S. 668 (1984).

[12] *Younger*, 580 A.2d at 556.

[13] *Strickland*, 466 U.S. at 694.

[14] *Younger*, 580 A.2d at 556.

[15] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988) (quoting *Strickland*, 466 U.S. at 688-94).

[16] *State v. Washington*, 2007 WL 2297092, Ableman, J. (Del. Super. Aug. 13, 2007).

[17] *Strickland*, 466 U.S. at 697.

failed to assert Defendant's right to confrontation, Defendant must also show that an effective lawyer would have asserted the right, and that asserting the right would have led to acquittal, or been a significant step in that direction.

13. As presented, Defendant's claims of ineffective assistance of appellate counsel fail to overcome the presumption that counsel was reasonable. Defendant claims that appellate counsel should have presented a Sixth Amendment violation claim, an insufficiency of evidence claim, and an illegal detention claim. Defendant fails to show, however, that it was unreasonable for appellate counsel not to pursue those claims, especially as they had not been raised at trial. Defendant offers nothing to prove that the standard of care for appellate counsel required that Defendant's claims should have been raised on appeal.

14. At best, Defendant attempts to satisfy *Strickland*'s first test by arguing that his appellate claims were valid and, therefore, appellate counsel's failure to raise them was unreasonable. In other words, Defendant asks the court to find prejudice first and then, in bootstrap fashion, conclude that appellate counsel breached the standard of care. The court will assume without deciding that in another case, appellate counsel's ineffectiveness might speak for itself, but that is not the case here. And so, Defendant is obligated to show that appellate counsel's

approach was more than wrong.[18]

15. According to Defendant, he and appellate counsel discussed the appeal and appellate counsel told him that, other than the matters presented on appeal, there were no claims worth mention. From that, it is clear that appellate counsel at least considered and rejected Defendant's claims. There is nothing in the record from which this court can conclude that appellate counsel's opinion fell below the prevailing standard of care.[19]

16. Moreover, Defendant fails to show prejudice. As discussed below in connection with Defendant's arguments against trial counsel, Defendant's claims do not reflect errors, plain or otherwise, that would make the outcome unreliable. Even assuming, *arguendo,* that Defendant passed the first *Strickland* test, he fails to show a reasonable probability that the outcome would have been different. Defendant attempts to prove prejudice by simply alleging it. Therefore, Defendant has also failed the second *Strickland* test.

17. Defendant's ineffective assistance of trial counsel claims fail for the same reasons as his claims against appellate counsel. Again, Defendant fails to

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[18] *See cf. Garrett v. United States*, 78 F.3d 1296 (8th Cir. 1996).

[19] *Id.* ("Law is an art, not a science, and many questions that attorneys must decide are questions of judgment and degree. Among the most difficult are decisions as to what issues to press on appeal....") (citing *Simmons v. Lockhart*, 915 F.2d 372, 375 (8th Cir. 1990)).

show that trial counsel's representation was unreasonable or prejudicial.

18. Defendant's concerns about his right to confrontation are baseless. Although the police got Defendant's number from a non-witness, Defendant's true accusers were the police who called Defendant's cell phone, set-up the deal with him, chased him, caught him, arrested him, and testified against him.

19. Further, it is reasonable for trial counsel to move for the exclusion of hearsay, or other evidence the lawyer believes may not be properly offered. That is especially so if the testimony is unfairly prejudicial.

20. Furthermore, trial counsel cross-examined all the State's witnesses and trial counsel's choice of cross-examination topics was reasonable. If counsel did not cross-examine about the telephone conversation, that was seemingly a tactical choice. Counsel clearly challenged other points in the State's case.

21. Finally, even if true, Defendant's claim that trial counsel failed to inform him about an option to waive a jury trial does not satisfy either of *Strickland*'s prongs. Under Delaware law, Defendant had no unilateral right to a bench trial, as the State must consent to go non-jury and the court must agree.[20] Most importantly, having heard the evidence presented to the jury, the court finds that a bench trial would not have made a difference.

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[20] *Fetters v. State*, 436 A.2d 796, 798-99 (Del. 1981).

22. In summary, the State's case was solid. It presented four detectives from the Wilmington Police Department who participated in the arranged drug sale and Defendant's apprehension. Trial counsel tried to minimize the damage from the State's evidence by focusing on the prosecution's weaknesses. Different defense attorneys might have done a few things differently, but the differences probably would have meant little to the outcome. Again, as to all of his claims, Defendant has not demonstrated, as he must, that trial counsel's representation fell below the standard of care. Nor has he shown actual prejudice.

For the foregoing reasons, Defendant's motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

/s/ Fred. S. Silverman
Judge

cc: Prothonotary (criminal)
Cynthia Faraone, Deputy Attorney General
Bartnell Newman